THE HONOURABLE SRI JUSTICE V.V.S.RAO

WRIT PETITION NO.460 OF 2004

% 08.06.2004

Between:

#D.R.Venkatesh, S/o.D.R.Iyyangar,
pharma India Ltd., plot No.154/A5,
Sy.no.172/U, SVCIE,IDA, Bollaram, Medak Dist.

.... PETITIONER

AND

$1 The Regional Provident Fund Commissioner, Employees provident

fund office,2nd Floor, Bhavishyanidhi Bhavan, Barkatpura, Hyderabad.
2 The Assistant Provident Fund Commissioner (Recovery, Sub-

Accounts office, patancheru, Medak Dist.

...RESPONDENTS

! Counsel for the petitioner: Mr. M.Sreeramulu Reddy

Counsel for the Respondent: Mr.R.N.Reddy

<Gist :

>Head Note:

? Cases referred:

2002-III-LLJ-779 (P&H)

IN THE HIGH COURT OF JUDICATURE, ANDHRA PRADESH
AT HYDERABAD

(Special Original Jurisdiction)

FRIDAY, THE SIXTH DAY OF AUGUST
TWO THOUSAND AND FOUR

PRESENT

THE HON'BLE MR JUSTICE V.V.S.RAO

WRIT PETITION NO: 460 of 2004

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Petition under Article 226 of the constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court will be pleased to to issue a writ, order or direction more particularly one in the nature of writ of mandamus declaring the action of the respondents in issuing the proceedings of the 2nd respondent vide proceedings No.AP/32402/SAO/PTC/ Enf(Recy)/Rc.No.7/01/2003 dated 18-12-2003 and proceedings dated 5-1-2004 is illegal, arbitrary and contrary to the provisions of Employees provident Fund and Misc. provisions Act, 1952.

Counsel for the Petitioner:MR.M.SREERAMULU REDDY

Counsel for the Respondents: MR.R.N.REDDY

The Court made the following:

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ORDER:

The petitioner is a Managing Director of M/s.SOM Phyto Pharma India Limited. He filed the writ petition challenging the order dated 18.12.2003 issued by the second respondent directing the petitioner to appear before the second respondent on 05.01.2004 to show cause as to why the petitioner should not be committed to civil prison in execution of the certificate issued by the authorised officer of the first respondent under Section 8-C(2) of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (the Act, for brevity). This Court while admitting the writ petition on 08.01.2004 also passed interim orders in W.P.M.P.No.631 of 2004 suspending the impugned letter/order of the second respondent. When the

application moved by the respondents being W.V.M.P.No.1743 of 2004 was listed before this Court, with the consent of the learned counsel for the respective parties, the matter was finally heard and this order shall dispose of the writ petition.

M/s.SOM Phyto Pharma India Limited (hereafter called, the Employer) is a public limited company, which is a registered employer with Employees Provident Fund Establishment. Alleging that contributions were not properly made by the said Company, action was initiated and the authorised officer issued a certificate under Section 8-C(2) of the Act for recovery of arrears of PF contributions and interest payable under Section 7-Q of the Act. After receipt of the certificate, the second respondent issued a demand notice dated 25.04.2001 calling upon the petitioner to pay an amount of Rs.12,31,157/- (Rupees twelve lakh thirty one thousand and one hundred and fifty seven only) within fifteen days from the date of receipt of the order. It appears, the petitioner paid an amount of Rs.10,528.83/- (Rupees ten thousand five hundred twenty eight and paise eighty three only) leaving a balance amount of Rs.12,20,628.17/- (Rupees twelve lakh twenty thousand six hundred twenty eight and paise seventeen only). Therefore, action was initiated for execution of the certificate by arrest and imprisonment of the petitioner. In that connection, the petitioner, who is a Managing Director of the Company, was asked to appear before second respondent.

In the counter affidavit filed by the Regional Provident Fund Commissioner (Legal) on behalf of all the respondents, it is stated that the employer is a covered establishment under the Act. As the employer failed to comply with the provisions of the Act, enquiry was initiated under Section 7-A of the Act. Though the accountant of the employer appeared in the enquiry, records were not produced on different occasions. Therefore, the dues were assessed as per the records available with the respondents as Rs.12,31,157/- (Rupees twelve lakh thirty one thousand and one hundred and fifty seven only) and proceedings were issued on 04.09.2000. Later, prohibitory order was issued under Section 8 of the Act on 02.11.2000, but still no amount was paid. The recovery officer then issued recovery certificate No.7/2001 dated 03.04.2001 followed by a demand notice dated 24.05.2001, in vain. When the respondent issued another prohibitory order dated 08.04.2002, an amount of Rs.10,528.83/- (Rupees ten thousand five hundred twenty eight and paise eighty three only) was paid by the employer. The cheque for an amount of Rs.25,000/- (Rupees twenty five thousand only) was returned by the Bank with endorsement “a/c freezed no operation allowed”. The department thereafter issued a warrant of attachment of movables/immovables on 30.07.2002 but the same could not be executed as the employer informed on 13.09.2002 that the properties of the employer are covered by pari passu charged in favour of financial institutions, namely, Industrial Development Bank of India (IDBI) and State Bank of Hyderabad (SBH). The show cause notice dated 24.11.2003 issued to the petitioner was returned with remarks “party out of station” and lastly when the impugned letter was issued asking the petitioner to appear before the second respondent, the petitioner approached this Court.

Learned counsel for the petitioner, Sri M.Sreeramulu Reddy contends that when once the property of the Company is attached, the Managing Director of the

Company cannot be arrested. He placed reliance on Section 8-B of the Act as well as an unreported judgment of Division Bench of this Court in **Targot Pure Drugs Limited v R.P.F. Commissioner,** in Writ Appeal No.177 of 2002 dated 11.03.2002. **Per contra,** the learned Standing Counsel for Employees Provident Fund Corporation Sri R.N.Reddy submits that even where the properties of the employer are attached for realising the arrears of PF, still the Managing Director or person-in-charge of the Company can be arrested. He placed reliance on the Division Bench judgment of Punjab and Haryana High Court in **Mohan v R.P.F. Commissioner**.

The only point that arises for consideration is whether the notice/letter issued by the second respondent calling upon the petitioner to appear for enquiry as to why he should not be arrested, is in accordance with Section 8-B of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952?

Section 8-B of the Act reads as under:

8-B. Issue of certificate to the Recovery Officer:- (1) Where any amount is in arrear under Section 8, the authorised officer may issue, to the Recovery Officer, a certificate under his signature specifying the amount of arrears and the Recovery Officer, on receipt of such certificate, shall proceed to recover the amount specified therein from the establishment or, as the case may be, the employer by one or more of the modes mentioned below:-

a. attachment and sale of the moveable or immovable property of the establishment or, as the case may be, the employer;

b. arrest of the employer and his detention in prison;

c. appointing a receiver for the management of the moveable or immovable properties of the establishment or, as the case may be, the employer:

Provided that the attachment and sale of any property under this section shall first be effected against the properties of the establishment and where such attachment and sale is insufficient for recovering the whole of the amount of arrears specified in the certificate, the Recovery Officer may take such proceedings against the property of the employer for recovery of the whole or any part of such arrears.

(2) The authorised officer may issue a certificate under sub-section (1), notwithstanding that proceedings for recovery of the arrears by any other mode have been taken.

The analysis of sub-section (1) of Section 8 of the Act would reveal that when an employer is in arrears, the authorised officer may issue, to the recovery officer, a certificate specifying the amount of arrears, where upon it shall be open to the recovery officer to proceed to recover the amount specified in the certificate from the establishment or the employer by one or more modes, namely, i) attachment and sale of moveable/immovable properties; ii) arrest of the employer and detention in prison; or iii) appointing receiver for management of the properties. Sub-section (2) clarifies that even where proceedings for recovery of arrears are taken by any other mode, it shall be competent for the authorised officer to issue a certificate under sub-

section (1) of Section 8 of the Act. It only means that the law contemplates the recovery of PF arrears even where the Department initiated proceedings for recovery of arrears by any other mode other than attachment and sale, arrest and appointment of receiver. Sub-section (2) intends to enlarge the options of Provident Fund Establishment to recover the PF arrears from the establishment or the employer.

The proviso to sub-section (1) of Section 8-B of the Act however curtails the power of the recovery officer in recovering the arrears in one or more modes mentioned in sub-section (1) of Section 8 of the Act. The provision is to the effect that when the recovery officer decides to recover the arrears of PF by attachment and sale of the property, such attachment shall be against the properties of the establishment. In case, such attachment and sale is insufficient for recovering the PF arrears specified in the certificate issued by the authorised officer, the recovery officer has to take such proceedings against the property of the employer for recovery of the whole or any part of such arrears. To my mind, the power of the recovery officer to attach and sale of immovable property is a drastic power and unless and until the same is exhausted, the power to arrest the employer may not be available to the recovery officer. For instance, if steps are taken for the sale of moveable/immovable property after attachment and such mode of recovery is sufficient to satisfy the amount mentioned in the certificate of recovery, there would not be any necessity to arrest the employer.

Having regard to the proviso, it would not be possible to resort to textual construction and reading the entire provision, it becomes clear that the proviso should be interpreted in the context in which it appears in the statute book. The procedure for recovery of arrears is well elaborated under the Act. The authorities under the Act cannot resort to arrest or attachment straightaway. After determining the amount under Section 7-A of the Act, the officer has to issue a recovery certificate giving adequate opportunity to the employer to pay PF arrears, and then only, a decision has to be taken for attachment. Even after attachment, if the PF arrears are not paid, it is always open to the recovery officer to bring the properties for sale. Therefore, I cannot agree with the submission of the learned counsel for the respondents that attachment and sale of property, and arrest of the employer can be simultaneous.

When the establishment or the employer fails to pay the PF arrears under the Act, the properties of the establishment can be attached and brought to sale. Even after selling the property, it is found that the sale proceeds are insufficient for recovering the whole amount of arrears, the properties of the employer can be attached and brought to sale. In such a case, after bringing the properties of the employer, the funds are sufficient for recovering the PF arrears, no further action need to be taken. The legislature makes the employer personally liable for paying the PF arrears only in the event of the properties of the establishment being insufficient. The personal liability, therefore, is not straightaway attracted. Such being the case, I am not able to agree with the submission that the attachment and

arrest can be simultaneous. In **Mohan v R.P.F. Commissioner** (Supra), the Punjab High Court held that the three modes of recovery mentioned in Section 8-B(1) of the Act are not exclusive of each other and alternative modes. It was laid down that it is for the recovery officer to resort to any one of the modes. There is no dispute on this aspect. The question, however, would be whether a recovery officer having resorted to the first mode of recovery, namely, attachment, could have legitimately issued a notice for arrest? This aspect of the matter was directly fell for consideration before the Division Bench of this Court in an unreported judgment in **Targot Pure Drugs Limited v R.P.F. Commissioner** (Supra). Their Lordships laid down as under:

> ...The learned counsel for the respondent-department states that apart from passing of the order of attachment, the department is also at liberty to arrest the employer and detain him in prison. We are unable to countenance the said submission. The proviso clearly says that the attachment and sale of any property under this section shall first be effected against the properties of the establishment and where such attachment and sale is insufficient, for recovering the whole of the amount of arrears specified in the certificate, the Recovery Officer may take such proceedings against the property of the employer for recovery of the whole or any part of such arrears. As already noticed, the property of the management has already been attached. The department is at liberty to proceed with the sale of the property attached and if the sale proceeds are not sufficient to discharge the amount mentioned in the certificate, the department is at liberty to initiate proceedings against the property of the employer for recovery of the whole or any part of such arrears. Arrest of the employer and his detention in prison cannot at all be made in view of the proviso to Section 8B (1) of the Act.

The decision of Division Bench supports the view I have taken. For the above reasons, the impugned letter/notice cannot be sustained. It shall, however, be open to the respondents to proceed with the sale of the properties attached in accordance with law.

The writ petition is accordingly disposed of. No costs.

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(V.V.S.RAO,J)

.08.2004.

Note: LR copy to be marked.

(By Order)

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To

1 The Regional Provident Fund Commissioner, Employees provident

fund office,2nd Floor, Bhavishyanidhi Bhavan, Barkatpura, Hyderabad.
2 The Assistant Provident Fund Commissioner (Recovery, Sub-

Accounts office, patancheru, Medak Dist.

3 2 CD copies

4. 8 LR copies.

5. The Under Secretary, Union of India, Ministry of Law, Justice and Company Affairs, New Delhi.

6. The Secretary, A.P.Advocates Association Library, High Court of A.P., Hyderabad.

One fair copy for the Honourable Sri Justice V.V.S.Rao (for his Lordship's kind perusal)